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REPORTER'S RECORD

VOLUME 40 OF 44 VOLUMES

TRIAL COURT CAUSE NO. 07-CR-885-B

- - - - - x
 THE STATE OF TEXAS : IN THE DISTRICT COURT
 :
 VS : 138TH JUDICIAL DISTRICT
 :
 MELISSA ELIZABETH LUCIO :
 :
 - - - - - x

POST TRIAL HEARING

STATE'S SUGGESTION OF DISQUALIFICATION OF COUNSEL,
REQUEST FOR MOTION FOR NEW TRIAL

On the 3rd day of October, 2008, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable, ARTURO C. NELSON, Judge Presiding, held in Brownsville, Cameron County, Texas.

Proceedings reported by computer and stenotype machine.

FILED IN
COURT OF CRIMINAL APPEALS

AUG 16 2008

Louise Pearson, Clerk

ORIGINAL

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1 P R O C E E D I N G S

2 THE COURT: Okay, we don't have Mr.
3 Blaylock here.

4 MR. BLAYLOCK: Here, Your Honor.

5 THE COURT: Where? I was looking for
6 you.

7 MR. BLAYLOCK: God morning.

8 THE COURT: Sit where I can see you,
9 John. I'm sorry.

10 MR. BLAYLOCK: Good to see you too,
11 Judge.

12 THE COURT: Call now the case of
13 Melissa Lucio. On 07-CR-885-B, let the record
14 reflect -- State of Texas versus Melissa Elizabeth
15 Lucio, that the defendant is present. Mr. Warner is
16 also present, along with Mr. Blaylock who is
17 representing him for the purposes of this hearing.

18 MR. BLAYLOCK: Yes, Your Honor.

19 THE COURT: And the State is
20 represented -- the movant is being represented by Mr.
21 Al Padilla and I had asked Mr. Cordova to be on
22 standby in case Ms. Lucio needed to confer
23 independently.

24 MR. CORDOVA: Your Honor, and just for
25 the record, I would just like for the Court to order

1 me to be here so that if there is any conflict
2 issues, that that covers me. And also the fact that
3 Ms. Lucio understands that because this is appellate
4 counsel and I am trial counsel, that perhaps some
5 conflict exists. I think Ms. Lucio knows me well
6 enough to know that I'm going to counsel her best
7 interest, but I think it is important that we put on
8 the record that she understands that a conflict may
9 exist and that she is waiving the conflict and asking
10 me to stand in with her.

11 THE COURT: Well, you've made your
12 record.

13 MR. WARNER: I'm going to object. I
14 don't see any need for Mr. Cordova to provide any
15 representation at all. The Court has asked me to
16 represent her on appeal and I am prepared to do that.
17 Mr. Blaylock is going to represent my interest on
18 this motion.

19 THE COURT: Mr. Warner, we are going
20 to go ahead. I am going to have Mr. Cordova just
21 stand by.

22 MR. CORDOVA: That's fine, Your Honor.

23 THE COURT: I am asking him to stand
24 by. And now I will entertain the State's motion.

25 MR. PADILLA: Judge, what we have

1 filed is a suggestion, Judge, of the possible
2 problems associated with Mr. Warner representing Ms.
3 Lucio. Obviously I don't think statutorily we have
4 the right to ask that he be dismissed, I don't think
5 that's the proper remedy. However, Judge, I think
6 the motion is pretty clear, we have attached some
7 case law which I think the Court can take judicial --

8 THE COURT: The Court will take
9 judicial notice of all documents on file.

10 MR. PADILLA: I have done the
11 supplemental response and I have read the objections.
12 I'm referring to Rule 26.05(2), 2 -- (2)(1), which
13 requires, you know, the appellate counsel to be
14 qualified also, Judge, and qualified under the
15 standards because I think there is an allegation made
16 in the statement that appellate counsel does not have
17 to have the same qualifications as trial counsel. I
18 believe that's an error, Judge, and the problem that
19 we have, the problem the State is worried about in
20 this matter, Judge, that we want the Court to
21 consider and rule on it because we don't want a
22 situation where we go through the trouble of taking
23 the matter up on appeal, getting the appeal affirmed
24 and then if the case goes into the Federal Court
25 system, which I anticipate it will, there will be a

1 writ of habeas corpus filed there alleging that
2 Mr. Warner, because of his previously made statements
3 and previous allegations under oath he was not
4 qualified to handle the appeal, and then we are back
5 to square one, Your Honor.

6 THE COURT: I understand your --

7 MR. PADILLA: He has made statements
8 under oath that he is not qualified to handle issues
9 on mitigation, things on that nature, and obviously
10 mitigation is probably going to be an appellate
11 issue, and if he is not qualified to try and defend
12 someone on the issue of mitigation, then how can he
13 also have the expertise to be able to appeal that
14 specific issue to the Court of Criminal Appeals?

15 THE COURT: I understand, I understand
16 your argument, I have read your motion.
17 Mr. Blaylock, your response?

18 MR. BLAYLOCK: Yes, Your Honor, and I
19 think that the premiere case on this is U.S. versus
20 Gonzalez-Lopez, and that's where the Supreme Court
21 has said that it's a very dangerous thing to mess
22 with the person's Sixth Amendment right to the
23 attorney of their choice. And she has chosen
24 Mr. Warner, right or wrong. She has given a
25 statement to the Court, which I would suggest to the

1 Court could be a waiver of these appellate
2 requirements of the attorney, if the Court chose to
3 read it that way. I understand the dilemma you are
4 in, Judge. You are in the dilemma to decide do I
5 leave Mr. Warner and leave a potential appellate
6 point of inadequate counsel under the statute? Or do
7 I remove Mr. Warner and get an appellate counsel
8 under the Sixth Amendment. And I don't know how you
9 are going to handle that, Judge, but I can tell you
10 that the Sixth Amendment right to a counsel of choice
11 is automatically reversible without a harm analysis.
12 I think everything else does require a harm analysis.

13 THE COURT: I understand. Ms. Lucio?

14 THE DEFENDANT: Yes, sir.

15 THE COURT: Let me tell you the crux
16 of my dilemma and then you tell me what you want,
17 because ultimately it's your case, your appeal, and
18 you are the one who has to be satisfied, okay?

19 THE DEFENDANT: Yes, sir.

20 THE COURT: Under the Code of Criminal
21 Procedure for appointed counsel, they have to be on a
22 list that is prepared by the Fifth Region
23 Administrative area, which is Judge Banales up in
24 Corpus Christi, okay? The law changed, and now the
25 lawyers that were on that list before are no longer

1 on that list. So that list is being recreated. Your
2 attorney has made an application to be certified as a
3 possible attorney to be appointed on appeals, capital
4 murder appeals, and you know some of his
5 qualifications by the affidavit I saw that you
6 signed.

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Okay. I initially
9 appointed him because I believed him to be competent.
10 You know, it's kind of a funny job for a Judge to
11 appoint lawyers who are going to give him problems.
12 The problem is that the problems he gives are legal
13 issues that the Judge has to look at that he may have
14 overlooked. And that's the nature of the process.
15 It's an adversarial process where one side goes
16 against the other.

17 Now, in your affidavit, you have said
18 that you are satisfied with him, that he has taken
19 the time to explain to you -- did you read the
20 affidavits before you signed them?

21 THE DEFENDANT: Yes, sir, I did.

22 THE COURT: Because they appear to be
23 written with law and what-not and they appear to be
24 prepared by a lawyer. I don't want you to tell me
25 anything about whether or not you prepared them, an

1 attorney prepared them, I don't want to get into
2 that. That's attorney-client communications and I
3 don't want go into that, I want you to understand
4 that, okay?

5 THE DEFENDANT: Yes, sir.

6 THE COURT: But I need to be sure that
7 you did read them, that you did understand them, and
8 that that is what you want. So from your own words,
9 I want you to tell me whether you want Mr. Warner to
10 continue, or whether you want somebody else.

11 MR. PADILLA: Your Honor, may I --

12 THE COURT: I am not going to allow
13 you to cross-examine her.

14 MR. PADILLA: No, I just want to bring
15 something to the Court's attention, Your Honor.

16 THE COURT: Yes, sir.

17 MR. PADILLA: She needs to also be
18 further advised on the Velez matter --

19 THE COURT: On the what, sir?

20 MR. PADILLA: On the Velez case, that
21 if he makes certain representations that she is aware
22 of, and whether that in and of itself would affect
23 her decision.

24 MR. WARNER: Oh, I would like to be
25 heard on that. I talked him out of that death

1 penalty case --

2 THE COURT: Excuse me, I am talking.
3 Okay. Do you understand everything that I have said
4 up until now?

5 THE DEFENDANT: Yes.

6 THE COURT: Okay. Now, Mr. Warner did
7 submit an affidavit on another case saying that he
8 was not qualified to handle some parts of that case,
9 do you understand that?

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Have you read that
12 affidavit at all?

13 THE DEFENDANT: I'm not sure.

14 THE COURT: Okay. The question in my
15 mind is, is this the attorney you want to continue
16 handling your appeal, and do you know, you know, the
17 background on this, that's the question, that's what
18 I need to find out.

19 THE DEFENDANT: Yes, sir.

20 THE COURT: So you need to tell me
21 from your own words whether you understand the issues
22 that the District Attorney is raising, that first of
23 all he is not on the list, secondly, you know -- and
24 what they are saying is they don't want the
25 conviction reversed because of a technical issue with

1 regards to your defense. My concern is not so much
2 the technical issue, although I am somewhat concerned
3 about that, my concern primarily is who you want to
4 represent you.

5 THE DEFENDANT: Yes, sir.

6 THE COURT: Okay? That's what my
7 concern is. And whether you know what you are doing
8 and whether you are waiving any objections at all
9 that may come up later with regards to Mr. Warner's
10 competence.

11 THE DEFENDANT: Uh-huh.

12 THE COURT: So you need to tell me in
13 your own words, ma'am, what do you want?

14 THE DEFENDANT: I want Mr. Warner to
15 represent me.

16 THE COURT: Mr. Larry Warner.

17 THE DEFENDANT: Yes, sir.

18 THE COURT: Do you understand what the
19 State's objections are? They are objecting first of
20 all that he is not on the list, secondly, that on
21 another case he submitted an affidavit saying he was
22 not competent to handle issues of mitigation.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: Do you understand that?

25 THE DEFENDANT: Yes, sir.

1 THE COURT: Do you understand what the
2 issues of mitigation are?

3 THE DEFENDANT: Yes, sir.

4 THE COURT: We went through trial,
5 your other lawyers explained them to you.

6 THE DEFENDANT: Yes, sir.

7 THE COURT: Are you sure you
8 understand it?

9 THE DEFENDANT: Yes, sir.

10 THE COURT: And that nonetheless, you
11 still want Mr. Warner to represent you?

12 THE DEFENDANT: Yes, sir.

13 THE COURT: Are you sure?

14 THE DEFENDANT: Yes, sir.

15 MR. PADILLA: And that she voluntarily
16 waives any possible defect, Your Honor, concerning
17 it, I would like for it to be on the record.

18 THE COURT: The State is asking that
19 you do it voluntarily and knowingly, and that you
20 waive any possible complaints of defects of any sort
21 with regards to his appointment.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: Are you sure?

24 THE DEFENDANT: Yes, sir.

25 THE COURT: Okay. Ms. Lucio,

1 ultimately it's your case.

2 MR. BLAYLOCK: Judge, I don't want to
3 interrupt, but could I maybe make a suggestion?
4 Should could she just waive the Article 26.05(2)
5 defects and not perhaps a future ineffective
6 assistance of counsel on a writ of habeas corpus? I
7 don't want a Federal Judge looking back saying, oh,
8 she waived every defect.

9 THE COURT: All I want her to do is
10 waive the defects with regards to Mr. Larry Warner's
11 appointment, that's all. If Mr. Warner becomes
12 ineffective or whatever, that will be up to another
13 lawyer to look at. But with regards to his
14 qualifications to be appointed and to represent her
15 on the appeal, that's what I want. She needs to
16 choose who she wants.

17 MR. BLAYLOCK: That's exactly the
18 point, I want to make it clear.

19 THE COURT: And if she is choosing him
20 and she is waiving any defects with regards to his
21 appointment, then that is what I want to hear from
22 her.

23 MR. PADILLA: And is the Court -- if
24 the Court accepts him, is the Court going to make a
25 finding that she is informed of the law, she is

1 informed of the facts surrounding the State's motion
2 and the underlying facts that the State is relying
3 on, and she voluntarily, again, is waiving that. I
4 want to make sure that the record is clear, Judge.

5 THE COURT: Ms. Lucio, have you read
6 their complaint against Mr. Warner?

7 THE DEFENDANT: Yes, sir.

8 THE COURT: Okay. So what the State
9 has argued against Mr. Warner, you are informed of
10 that?

11 THE DEFENDANT: Yes, sir.

12 THE COURT: And you have read that.

13 THE DEFENDANT: Yes, sir.

14 THE COURT: Okay. In your own words,
15 again, please tell me, who do you want to represent
16 you on the appeal?

17 THE DEFENDANT: Mr. Larry warner.

18 THE COURT: Are you waiving any
19 potential complaints with regards to his appointment.

20 THE DEFENDANT: Yes, sir.

21 THE COURT: Okay. The hearing is
22 over. Thank you, gentlemen. Thank you, Mr. Warner.

23 MR. BLAYLOCK: May I be excused?

24 THE COURT: Yes, sir, you may.

25 MR. PADILLA: Is the Court going to

1 make a ruling?

2 THE COURT: Pardon?

3 MR. PADILLA: Is the Court going to
4 make a ruling?

5 THE COURT: I have ruled. I am going
6 keep Mr. Warner on, that's who she wants.

7 MR. PADILLA: I know that's what she
8 wants, but does the Court make a finding that she has
9 voluntarily chosen --

10 THE COURT: Prepare the order.
11 Mr. Gonzalez, please, prepare the order. Make sure
12 Mr. Warner gets a chance to look at it first.

13 MR. PADILLA: Get Mr. Blaylock to look
14 at it, Judge? It might be easier.

15 THE COURT: Get Mr. Blaylock --
16 whoever, Mr. Blaylock or Mr. Warner, one of the two,
17 to look at the order, the findings of the fact and
18 the order that you're suggesting.

19 MR. PADILLA: He is easier to find.

20 THE COURT: Thank you.

21 MR. WARNER: May I address the Court
22 on another matter on Ms. Lucio's case?

23 MR. PADILLA: May we be excused, your
24 Honor?

25 THE COURT: Yes, sir -- well, hold on.

1 MR. WARNER: We are here on that case.

2 THE COURT: Yes, sir, I am listening.

3 MR. WARNER: October the 14th is the
4 75th day after the Court pronounced the sentence. We
5 filed a Motion for New Trial. There are issues of
6 fact which the Court ought to resolve.

7 I would appreciate it if you would
8 look at our Motion for New Trial, see if you agree
9 that there are issues of fact which if true would
10 entitle her to a new trial and set it for a hearing
11 on the Motion for New Trial on or before October the
12 14th.

13 THE COURT: The Court will either rule
14 on that, or it will be ruled on by operation of law
15 as Mr. Warner knows. Thank you.

16 MR. WARNER: Yes.

17 THE COURT: Thank you, sir.

18 MR. WARNER: Thank you, Your Honor.

19 May we be excused?

20 THE COURT: Yes, you may.

21 MR. PADILLA: Thank you, Your Honor.

22 THE COURT: Thank you, sir. Are there
23 any extra -- do we have any extra bailiffs around
24 right now or are they all busy?

25 THE BAILIFF: Let me check.

1 THE COURT: If there's one extra,
2 Let's give Mr. Warner some time with his client in
3 one of the jury rooms.

4 MR. WARNER: Thank you, Your Honor.

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1 THE STATE OF TEXAS:


2 COUNTY OF CAMERON:

3 CERTIFICATE OF COURT REPORTER

4 I, SUE CHANEY SAENZ, Official Court Reporter in
5 and for the Judicial District Courts of Cameron
6 County, State of Texas, do hereby certify that the
7 above and foregoing contains a true and correct
8 transcription of all portions of evidence and other
9 proceedings requested in writing by counsel for the
10 parties to be included in this volume of the
11 Reporter's Record, in the above-entitled and numbered
12 cause, all of which occurred in open court or in
13 chambers and were reported by me.

14 I further certify that this Reporter's Record of
15 the proceedings truly and correctly reflects the
16 exhibits, if any, admitted by the respective parties.

17 WITNESS MY OFFICIAL HAND on this the 5th day of
18 June, 2009.

19 
20 SUE CHANEY SAENZ, CSR
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25 Certificate No. 2136
Expiration Date: 12/31/10

SUE CHANEY SAENZ, C.S.R.